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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TERRILL JOHNSON, on behalf of himself, all others similarly situated, and the general public, Plaintiff, vs. Q.E.D. Environmental Systems Inc., a Michigan corporation; and DOES 1-50, inclusive, Defendants.	Case No. 3:16-cv-01454-WHO CLASS ACTION **Q.E.D. ENVIRONMENTAL SYSTEMS INC.'S NOTICE OF MOTION AND MOTION TO DENY CLASS CERTIFICATION** Date: March 8, 2017 Time: 2:00 p.m. Location: Courtroom 2 – 17th Floor Before: Hon. William H. Orrick

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 8, 2017 at 2:00 p.m., or as soon thereafter as counsel may be heard, before Judge William H. Orrick in Courtroom 2 – 17th Floor, at the above-entitled court, Defendant Q.E.D. Environmental Systems Inc. ("QED") will bring on for hearing this motion to deny certification of the class action under Federal Rule of Civil Procedure 23. This motion is made on the ground that Plaintiff cannot satisfy any of the required elements under 23(a) or 23(b), as more fully set forth in the attached memorandum. This motion is based on this notice, the attached memorandum of points and authorities, and the declaration of Amy S. Conners and accompanying exhibits submitted herewith.

Dated: January 31, 2017

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By *___/s/ Amy S. Conners___*
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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Q.E.D. Environmental Systems, Inc. ("QED") moves this Court to deny certification of the putative class in this action under Federal Rule of Civil Procedure 23.

I. INTRODUCTION

In this wage-and-hour case, Plaintiff Terrill Johnson seeks to represent a putative class of Defendant QED's non-exempt employees. Plaintiff cannot certify a class because the undisputed evidence, including Plaintiff's own testimony, directly contradicts all of his class-based allegations. Plaintiff cannot meet his burden to prove any of Rule 23(a)'s prerequisites of numerosity, commonality, typicality, or adequacy, nor can he satisfy any of Rule 23(b)'s requirements for maintenance of a class action. QED therefore affirmatively moves to deny class certification.

Plaintiff's counsel has known for over a year that QED's non-exempt employees at its San Leandro, California, facility could not possibly meet federal numerosity requirements. During his deposition, Plaintiff confirmed that a *maximum* of seven employees in San Leandro could have experienced occasional interrupted meal breaks. Plaintiff also testified that QED never had a policy or practice that was in conflict with California law, that QED never had a policy or practice of shortening employees' meal breaks, and that he had no knowledge whatsoever of any policy or practice regarding meal breaks in Defendant's facilities outside of the San Leandro facility.

Moreover, Plaintiff has admitted that his alleged injury is neither common nor typical. Plaintiff testified in detail about the unique nature of his personal claims against QED. Under oath and contrary to the allegations made by his counsel in the Third Amended Complaint ("TAC"), Plaintiff repeatedly asserted that he was a victim of disparate treatment and that he was allegedly singled out by one supervisor.

/ / /

Because his alleged injury is not common or typical of other putative class members, Plaintiff cannot be an adequate representative. Indeed, Plaintiff was not even aware that he had been named as a class representative, and he has never met his lawyers in person.

Finally, Plaintiff's counsel would not fairly and adequately represent the putative class because they have shown a stunning indifference to the truth. Concurrent with this motion, QED has filed a motion to dismiss pursuant to Rule 11 based on the troubling actions of Plaintiff's counsel.

Plaintiff cannot meet his burden to prove any of Rule 23(a) or (b)'s prerequisites for maintaining a class action. Therefore, QED respectfully requests that the Court grant its motion to deny class certification.

II. FACTUAL RECORD IN SUPPORT OF MOTION TO DENY CLASS CERTIFICATION

On December 12, 2016, after rejecting 11 proposed deposition dates, Plaintiff's counsel finally permitted QED to depose named Plaintiff Terrill Johnson. During the deposition, Plaintiff systematically contradicted each relevant allegation in the TAC. Plaintiff's sworn testimony-as detailed below-provides the basis for QED's motion, and it is all the Court needs to grant the motion and deny class certification.

A. Plaintiff's knowledge is limited to the San Leandro facility.

Plaintiff has alleged and testified about conduct at only one QED facility in San Leandro, California. (TAC ¶ 5, ECF No. 29; Johnson Dep. Tr. at 28:9-12, 23-24; 29:3-5.)[1] Plaintiff has no personal knowledge about the working conditions of any other QED facility. (*Id.* at 77:8-19.) Plaintiff has never communicated with any QED employee outside of San Leandro. (*Id.* at 77:3-19; 83:7-22.)

[1] All deposition citations are to the Deposition Transcript of Plaintiff Terrill Johnson, dated December 12, 2016 (hereinafter "Johnson Dep. Tr."), attached as Exhibit A to the Declaration of Amy S. Conners (hereinafter "Conners Decl.").

B. Fewer than two dozen non-exempt employees worked at San Leandro during the relevant period.

QED put Plaintiff on notice in January 2016–four months before Plaintiff filed the TAC–that the San Leandro facility's number of non-exempt employees did not meet the numerosity requirements for a federal class action. (Jan. 7, 2016 letter from Sarah Crippen to Plaintiff's counsel attaching Aff. of David D. Simpson, dated Jan. 6, 2016, regarding number of employees at San Leandro facility, Conners Decl., Ex. B.) Plaintiff's testimony confirmed that fact; he testified that he believed that QED's San Leandro facility (the subject of Plaintiff's allegations) employed only 22 people–total–as employees. (Johnson Depo. at 28:9-12, 23-24; 29:3-5.)

> Q. Okay. What other - what other guys did the job that you did, that production technician job, from, say, 2010 to 2014? Do you remember who else was a production technician at QED during that time period?
> * * *
>
> A. . . . . There was like 22 of us.
>
> * * *
>
> Q. Good. You said there were 22 of you. Do you mean 22 total employees at that facility –
>
> A. Yes.
>
> * * *

(Johnson Dep. Tr. at 28:9-12, 23-24; 29:3-5.)

Of these employees, only a few took meal breaks in the same manner as Plaintiff did. Indeed, Plaintiff speculated that a maximum of seven employees could have possibly experienced the same meal break irregularities that form the basis of this action:

> Q. Okay. Anyone else that you can think - remember having their lunch breaks interrupted?
>
> A. No, that's about it, ma'am.
>
> Q. I count - so I counted seven people that you identified. Does that sound about right in terms of the number of people that had

> lunches interrupted as - as you remember it in the last three or four years you were employed?
>
> . . . .
>
> Do you recall any more than seven people having that happen to them over the three or four years that you were last employed by QED?
>
> A. Yeah, I would say that.
>
> Q. You would say it was more than seven or those are the seven –
>
> A. Those are the seven I mentioned. Just the seven I mentioned.

(*Id.* at 52:1-8, 13-20.)

C. Plaintiff's claims are based on his supervisor's allegedly "singling out" Plaintiff for disparate treatment--not typical or common wage-and-hour violations.

Plaintiff believes his supervisor "singled him out" and treated him differently than the other production technicians. Plaintiff was convinced that such disparate treatment was at the heart of this action. In fact, Plaintiff did not even realize before his deposition that he was a putative class representative. (*See* Johnson Dep. Tr. at 58:13-18; 72:20-73-20; 74:22-25; 76:3-6, 9-10; 58:13-18; 75:1-5, 16-23.) Plaintiff's testimony consistently highlights the individual nature of his perceived wrongs at QED:

> Q. I'm asking what your understanding is. What do you say that QED did wrong?
>
> A. The pay. And like I stated earlier in the beginning of this, it was favoritism, wrongfully - wrongfully (sic) action towards me.
>
> Q. What specific wrongful action towards you that – do you claim were the result of favoritism?
>
> A. The way the man talked to me, the way he approached me. You know, he was so totally different from the other employees, you know. I know I was treated unfairly. I know that. That's – that's without a doubt. And the wages was – was – was – wasn't fair either, so I know that for a fact.
>
> Q. When you say you know you were treated unfairly, in what way were you treated unfairly?

/ / /

A. Let's understand one thing. I don't know – Revell Jackson was a bully. Okay? Let's get that out on the table. He was a bully. And he treated me unfairly. He talked to me bad. He always called me into the office with some negativity, but I always was there doing my work. And anybody will tell you that that worked for the man.

Q. And it's your opinion that he singled you out for that treatment?

A. That's a fact, ma'am. It's no opinion. It's a fact.

* * *

Q. Okay. And you felt you were singled out by Mr. Jackson for things that he didn't criticize other people for that – that reported to him?

A. That's – that's correct.

Q. Okay. Do you understand, Mr. Jackson (sic) [Mr. Johnson] that this lawsuit does not include any claim of unfair treatment by Mr. Jackson or treatment of – of you as an individual?

A. No, I wasn't aware of that.

* * *

A. Yeah, that's my understanding now.

Q. What are you asking the Court to do? What – what relief do you want from the Court in this lawsuit?

…

A. I don't know what to tell you. I mean, I have no statement on that.

Q. You – you don't have an idea in mind of what you want the Court to order in this case?

…

Q. Do you have any more of an answer, Mr. Johnson?

A. No.

(*Id*. at 72:20-73:20; 74:22-75:5; 75:21-23; 76:3-6, 9-10.)

Plaintiff testified that he was singled out because his supervisor did not allow him to keep his time card at his workstation, (*id*. at 54:3-23), and that he was singled out by his supervisor who only criticized Plaintiff and one other co-worker when they went on break (*id*. at 74:1-15; 22-25). Before his deposition, Plaintiff believed the lawsuit included a claim of unfair treatment by his supervisor. (*Id.* at 75:1-21.)

D. Plaintiff admitted that QED's policies did not violate California law.

Despite allegations in the TAC that QED lacked policies that complied with California's wage-and-hour laws, Plaintiff admitted under oath that he personally received a *complete* copy of the July 2012 QED Employment Manual and that it contained policies specifically applicable to California employees that accurately described California's wage-and-hour laws. (Johnson Dep. Tr. at 133:19-25; 135:1-8.) Plaintiff further admitted that, contrary to the TAC, he was always aware of the meal break requirements under California law. (*Id.* at 133:19-135:8.) Plaintiff also admitted that, to his knowledge, QED never had a policy that violated California's wage-and-hour laws by allowing for the interruption or cancellation of meal breaks, again in direct opposition to many allegations in the TAC, including ¶¶ 25, 26, 28, 29, 31, 52, 54, 55, 57, 64, 76, 79, 80, 102, 107, and 108. Plaintiff testified:

Q. Okay. And are you aware of any policy that QED had that allowed for interruption of your meal breaks?

A. Not at all.

Q. Okay. Are you aware of any policy that provided that QED could cancel your meal breaks altogether?

A. No.

(*Id.* at 78:12-18.)

E. Plaintiff's testimony disproves the allegations that he received inaccurate wage statements.

In addition to admitting that he had no basis to claim that QED's policies were deficient, Plaintiff also admitted that he was not aware of receiving inaccurate wage statements, directly contradicting multiple allegations in the Second through Sixth Causes of Action of the TAC.

/ / /

Q. Okay. Are you – as you sit here today, are you aware of ever getting an inaccurate earnings statement from QED?

...

Q. I'm just asking what you're aware of.

A. Not of my knowledge.

(Johnson Dep. Tr. at 90:13-15, 19-20.)

F. Plaintiff and his counsel are not adequate representatives.

Plaintiff has never met any of his attorneys in person-not even at his deposition, which his counsel attended via videoconference only.

Q. Mr. Johnson, have you ever met Mr. Segal in person?

A. No.

Q. Have you met Farah [sic] Grant in person?

A. No.

Q. Have you ever met Shaun Setareh in person?

A. No.

Q. Have you met any of the attorneys that are representing you in this matter in person?

A. No.

(*Id.* at 158:18-159:2.)

Plaintiff's counsel did not prepare Plaintiff for his deposition. (*Id.* at 17:11-23.) Plaintiff's counsel also did not ask Plaintiff to review or sign discovery responses before serving them upon QED. (*Id.* at 107:3-16; 108:5-13.) Finally, Plaintiff did not know he was class representative in this matter.

Q. Okay. I'm asking if that's your understanding, that you are–you have been put forward by the attorneys in this case as a representative of a class of employees?

***

A. I never knew that.

(*Id.* at 58:13-16, 18.)

III. ARGUMENT

A. Legal Standard.

Under Rule 23, a court may only certify actions as class actions if plaintiffs meet their burden to prove the action satisfies enumerated criteria – specifically, the "four requirements of Rule 23(a) and at least one requirement of Rule 23(b)." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 612 (N.D. Cal. July 8, 2015) (citing *Gen. Tel. Co. of SW. v. Falcon*, 457 U.S. 147, 158-61 (1982)).

Although courts typically address class certification upon a plaintiff's motion, a defendant may seek resolution of the question through a motion to deny certification. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939-40 (9th Cir. 2009); *Otto v. Abbott Labs, Inc.*, No. 5:12-CV-01411-SVW-DTB, 2015 U.S. Dist. LEXIS 56121, at *4-5 (C.D. Cal. Jan. 28, 2015). Motions to deny class certification filed after the substantial completion of discovery are assessed "using a straightforward Rule 23 analysis."[2] Newberg, Newberg on Class Actions § 7:22 (5th ed. 2013); *accord Vinole*, 571 F.3d at 940; *Otto*, 2015 U.S. Dist. LEXIS 56121, at *4-5. That is, the plaintiff must carry the burden of demonstrating that his purported class is certifiable under Rule 23.[3]

Pursuant to Rule 23(a), a plaintiff must show:

(1) "that the class is so numerous that joinder of all members is impracticable ("numerosity");

/ / /

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[2] In this case, the straightforward Rule 23 standard applies. Plaintiff filed this case on May 10, 2015, and discovery is substantially complete.

[3] Plaintiff's Sixth Cause of Action is a claim under the Fair Labor Standards Act (FLSA). TAC ¶ 100. These allegations are subject to the FLSA's collective action certification. 29 U.S.C. § 216(b). Plaintiff's claim should not be certified under the collective action certification for the same reason that his claim fails Rule 23(a). However, since only Plaintiff has opted-in to the lawsuit, there is no class of employees to certify. *See id.* ("No employee shall be a party plaintiff to any such action unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

> (2) there are questions of law or fact common to the class ("commonality");
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and
>
> (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy")."

Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012). If a plaintiff can carry his burden with respect to each of the Rule 23(a) prerequisites, he must then show that the proposed class meets the definition of one type of class action listed in Rule 23(b).[4]

A plaintiff must support his claim for class action certification with "evidentiary proof" for each prerequisite. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Rule 23 requires more detail than that acceptable under the Rule 8 pleading standard. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of 23(a) [and 23(b)] have been satisfied." *Id.* at 350-51; *Behrend*, 133 S. Ct. at 1432.

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[4] Under Rule 23(b) a plaintiff must show:

> (1) separate adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members' claims;
> (2) declaratory or injunctive relief is appropriate based on the defendant's acts with respect to the class generally; or
> (3) common questions predominate and a class action is superior to individual actions.

Fed. R. Civ. P. 23(b)(1)-(3).

Because Plaintiff cannot carry his burden under Rule 23(a), the Court need not address the elements of Rule 23(b). For completeness, QED addresses Rule 23(b) briefly in Section III.C, *infra*.

B. Plaintiff cannot satisfy his burden of proof on any of the Rule 23(a) prerequisites.

1. With at most seven members, Plaintiff's putative class lacks numerosity.

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." *Stockwell v. City & Cnty. of San Francisco*, No. C 08-5180, 2015 U.S. Dist. LEXIS 61577, at *12 (N.D. Cal. May 8, 2015). "[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or more members, and will find that it has not been satisfied when the class comprises 21 or fewer." *Id.* Plaintiff is not even close to reaching the numerosity threshold.

In the TAC, Plaintiff alleged:

> The class members are so numerous that the individual joinder of each individual class member is impractical. While Plaintiff does not currently know the exact number of class members, Plaintiff is informed and believes that the actual number exceeds the minimum required for numerosity under California and federal law.

(TAC ¶ 12, ECF No. 29.)

Plaintiff knew when making this assertion that it was untrue; four months before the TAC, QED placed Plaintiff on notice that he could not possibly satisfy his burden of proving numerosity. (Conners Decl., Ex. B.) Plaintiff's testimony only confirms the accuracy of QED's notice.

The only QED facility about which Plaintiff has any personal knowledge–the San Leandro facility–employed just over 20 total non-exempt employees during the relevant time period. (Johnson Dep. Tr. at 28:9-12, 23-24; 29:3-5.) By his own admission, Plaintiff has no personal knowledge of and has never communicated with any other QED facility. (*Id.* 77:3-19; 83:7-22.)

Moreover, within the San Leandro facility, Plaintiff is only aware of seven employees who *may* have had shortened lunch breaks. (*Id.* at 52:13-20.) Of those seven employees, Plaintiff only has personal knowledge of the breaks taken by the three or four employees who performed the same job as Plaintiff. (*Id.* at 52:1-8; 13-20.) This means a putative class of three or four employees–a total woefully short of satisfying Rule 23(a)'s numerosity requirement. *See Stockwell*, 2015 U.S. Dist. LEXIS 61577, at *12; *see* also *In re Intel Sec. Litig.*, 89 F.R.D. 104, 111 (N.D. Cal. 1981) ("Where the number of class members exceeds forty, and particularly where class members number in excess of one hundred, the numerosity requirement will generally be found to be met.").

2. Plaintiff's putative class lacks commonality.

The Rule 23(a) standard for commonality is construed permissibly, and "[a]ll questions of fact and law need not be common to satisfy the rule." *Sandoval v. M1 Auto Collisions Ctrs.*, 309 F.R.D. 549, 563 (N.D. Cal. 2015) (citing *Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998)). However, commonality requires that the class members have suffered the same injury. *Dukes*, 564 U.S. at 349-50. What matters is the "'capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.'" *Id.* (internal citation omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answer." *Id.* Here, Plaintiff cannot establish commonality of QED's policies or practices as to any alleged injury.

In the TAC , Plaintiff alleged:

> Common questions of law and fact exist as to all class members and predominate over any questions which affect only individual class members. These questions include, but are not limited to:
>
> A. Have Defendants maintained a policy or practice of failing to provide employees with their meal breaks?
>
> B. Have Defendants failed to pay additional wages to class members when they have not been provided with required meal periods?
>
> C. Have Defendants failed to provide class members with accurate written wage statements as a result of providing them with written wage statements with inaccurate entries for, among other things, amounts of gross and net wages, and time worked?
>
> D. Have Defendants applied policies or practices that result in late and/or incomplete final wage payments?
>
> E. Are Defendants liable to class members for waiting time penalties under Labor Code § 203?

F. Are class members entitled to restitution of money or property that Defendants may have acquired from them through unfair competition?

(TAC ¶ 13, ECF No. 29.)

Plaintiff cannot meet his burden of proof that these are, in fact, questions common to a putative class. First, Plaintiff's own testimony proves that QED maintained a meal break policy compliant with California and federal labor law. Plaintiff testified he received a copy of the California addendum to QED's employee handbook, which Plaintiff's counsel improperly omitted from Exhibit A to the TAC. (Johnson Dep. Tr. at 133:19-25; 135:1-8.)[5] The California addendum lays out, in detail, QED's policies for taking, waiving, and punching in/out for meal breaks. Each of these policies indisputably complies with California and federal labor law. (Conners Decl., Ex. C at 1-2.)

Second, Plaintiff cannot support his allegations of a common injury. As an initial matter, Plaintiff's own testimony undermines any claim of inaccurate wage statements. Of all the wage statements Plaintiff received from QED, he could identify none as inaccurate. (Johnson Dep. Tr. at 90:13-15, 19-20.) *Ridgeway v. Wal-Mart Stores, Inc.*, No. C 08-5221, 2014 U.S. Dist. LEXIS 126806, at *28-29 (N.D. Cal. Sept. 10, 2014) (denying class certification for claims of inaccurate wage statements because plaintiffs failed to show that putative class members shared a common injury as a result of the missing wage statement information that could be adjudicated on a class-wide basis, and plaintiffs also failed to show that there are common legal questions that predominate over the individualized issues for plaintiffs' wage statement claims.) Thus, Plaintiff cannot prove his own injury, much less an injury to others.

More important, Plaintiff testified that the alleged injuries he suffered were pointedly personal. Plaintiff claimed repeatedly he was singled out for disparate, negative treatment by his supervisor. (Johnson Dep. Tr. at 72:20-73:20; 74:22-75:5, 21-23; 76:3-6, 9-10.) By definition, disparate treatment is inherently *un*common treatment. *See* Black's Law Dictionary 538 (9th ed. 2009) (defining "disparate treatment" as "[t]he practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age, or disability."). Plaintiff's claims, therefore, cannot address the "same injury" as other purported class members, and Plaintiff cannot establish commonality. *See Dukes*, 564 U.S. at 349-50 ("[The] common contention . . . must be of such a nature that it is capable of classwide resolution–which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

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[5] This deliberate attempt to deceive the Court is one of the bases for QED's companion motion to dismiss pursuant to Rule 11.

3. Plaintiff's putative class lacks typicality.

Plaintiff's putative class also fails the typicality requirement of Rule 23(a). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Sandoval*, 309 F.R.D. at 568 (citing *Hanlon*, 150 F.3d at 1020); *see also Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003). Even so, the class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 457 U.S. at 156 (1982). "[T]he commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 564 U.S. at 349 n.5.

In the TAC, Plaintiff alleges:

> Plaintiff's claims are typical of the other class members' claims. Plaintiff is informed and believes and thereon alleges that Defendants have a policy or practice of failing to comply with the Labor Code and the Business and Professions Code as alleged herein.

(TAC ¶ 14, ECF No. 29.)

For the same reasons that Plaintiff cannot meet the commonality requirement, Plaintiff fails the typicality requirement. He does not have the same interests as a putative class because he believes he was singled out for disparate treatment. (Johnson Dep. Tr. at 72:20-73:20; 74:22-75:5, 21-23; 76:3-6, 9-10.) Moreover, Plaintiff's testimony contradicts the TAC allegations that QED had "a policy or practice of failing to comply" with California law. Instead, Plaintiff testified that QED **had no** policy that allowed for the interruption or cancellation of meal breaks, again in direct opposition to many allegations in the TAC, including ¶¶ 25, 26, 28, 29, 31, 52, 54, 55, 57, 64, 76, 79, 80, 102, 107, and 108. Plaintiff testified:

> Q. Okay. And are you aware of any policy that QED had that allowed for interruption of your meal breaks?
>
> A. Not at all.
>
> Q. Okay. Are you aware of any policy that provided that QED could cancel your meal breaks altogether?
>
> A. No.

(Johnson Dep. Tr. at 78:12-18.)

4. Plaintiff's putative class lacks adequacy of representation.

Under Rule 23(a)(4), the adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26, 689 (1997). Representation is only adequate if: "(1) the class representative and counsel do not have any conflicts of interest with other class members; and (2) the representative plaintiff and counsel will prosecute the action vigorously on behalf of the class." *See Staton*, 327 F.3d at 957. Necessarily, a class representative must also suffer the same injury as the class members and be part of the class. *Amchem*, 521 U.S. at 626 (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). For these reasons, the adequacy of representation requirement tends to merge with the commonality and typicality criteria. *Id.* at 626 n.20.

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In the TAC, Plaintiff alleges:

> Plaintiff is an adequate class representative in that he has no interests that are adverse to, or otherwise in conflict with, the interests of absent class members and is dedicated to vigorously prosecuting this action on their behalf. Plaintiff will fairly and adequately represent and protect the interests of the other class members.

(TAC ¶ 15, ECF No. 29.) Further, Plaintiff alleged:

> Plaintiff's counsel are adequate class counsel in that they have no known conflicts of interest with Plaintiff or absent class members, are experienced in wage and hour class action litigation, and are dedicated to vigorously prosecuting this action on behalf of Plaintiff and absent class members.

(*Id.* at 16.)

Plaintiff cannot be an adequate class representative because he himself does not believe that he has the same claims as putative class members. Because he testified that he was "singled out" for disparate treatment, Plaintiff has obvious conflicts with any potential class members and will not be an adequate class representative. Indeed, until his deposition, he did not understand that he was the class representative here:

> Q. Okay. I'm asking if that's your understanding, that you are-you have been put forward by the attorneys in this case as a representative of a class of employees?
>
> ***
>
> A. I never knew that.

(Johnson Dep. Tr. at 58:13-16, 18.)

Plaintiff's counsel is also not qualified to adequately represent a putative class. A "failure to make a reasonable pre-filing investigation of proposed class representatives is sufficient to find counsel inadequate." *Ballan v. Upjohn Co.*, 159 F.R.D. 473, 489 (W.D. Mich. 1994) (rejecting class certification for inadequate counsel because counsel failed to screen plaintiffs). Plaintiff's attorneys have never met with Plaintiff, did not prepare him for his deposition, and did not attend his deposition in person. (Johnson Dep. Tr. at 158:18-159:2.) Moreover, they signed a pleading riddled with misrepresentations and omissions, as described in QED's simultaneously-filed motion for Rule 11 sanctions. All of these actions make clear that Plaintiff's attorneys are not acting in the best interests of Plaintiff or putative class members.

C. Plaintiff cannot satisfy any of the elements of Rule 23(b) and therefore cannot maintain a class action.

Even if Plaintiff could meet the requirements of Rule 23(a), his class action would fail because he cannot satisfy any element of Rule 23(b). Rule 23(b)(1) governs where the action is primarily for damages. In such cases, where adjudication of an individual class member's claims would not be dispositive of the interests of other class members, certification under Rule 23(b)(1) is not appropriate. *Util. Consumers' Action Network v. Sprint Sols., Inc.*, 259 F.R.D. 484, 488 (S.D. Cal. 2009). Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is injunctive. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Finally, under Rule 23(b)(3), class certification is only appropriate when "questions of law or fact common to class members predominate over any questions affecting only individual members." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). Plaintiff has failed to identify a Rule 23(b) theory under which he is proceeding–itself a fatal omission–but even a cursory review of each option shows Plaintiff unable to satisfy the Rule.

This case is primarily an action for damages. Individual adjudication of Plaintiff's damages will not be dispositive of the interests of other class members, therefore certification under Rule 23(b)(1) is inappropriate. *Util. Consumers' Action*, 259 F.R.D. at 488. In particular, Plaintiff is adamant about the unique and individual nature of his damages and claims. By definition, his claims will not impact the interests of other putative class members.

/ / /

Although Plaintiff nominally seeks declaratory relief in the TAC, the primary relief sought here is monetary damages. (TAC ¶¶ 68, 110, 111, 112, ECF No. 29.) Class certification under Rule 23(b)(2), therefore, is not appropriate. *See Zinser*, 253 F.3d at 1186; *Util. Consumers' Action*, 259 F.R.D. at 488.

Finally, common questions of law or fact do not predominate in this action. Plaintiff testified that QED did not have a policy or practice that violated California law. (Johnson Dep. Tr. at 78:12-18; 133:19-135:8.) He testified that he was "singled out" for disparate treatment and that his supervisor gave preferential treatment to other employees. (*Id.* at 54:3-23; 74:1-15, 22-25; 75:1-21). And, even if Plaintiff were not so insistent that his claims are unique, the TAC's allegations regarding an inconsistently-enforced policy require individualized inquiries that defeat predominance. The mini-trials needed to assess the purported wage-and-hour violations in this case require evidence that varies from worker to worker, making class treatment inappropriate–even were there a greater number in the putative class. *See Tyson Foods*, 136 S. Ct. at 1045. For these reasons, Plaintiff cannot meet the standard for certification under Rule 23(b)(3).

IV. CONCLUSION

Because Plaintiff cannot meet his burden to prove any of the prerequisites enumerated in Rule 23(a) or any element of Rule 23(b), Defendant QED respectfully requests that the Court deny class certification and grant such other and further relief it deems just and proper.

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